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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 17, UNITED MINE WORKERS OF AMERICA, and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

and

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Of Counsel:

LAWRENCE B. KRAUSE
General Counsel
Chamber of Commerce of the United States of America
1615 H Street, N.W.
Washington, D.C. 20062

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

VINCENT J. APRUZZESE
MAURICE J. NELLIGAN, JR.
APRUZZESE & MCDERMOTT
Independence Plaza
500 Morris Avenue
Springfield, New Jersey 07081

Attorneys for the Chamber of Commerce of the United States of Amercia

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Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the position of Petitioner, Carbon Fuel Company. The motion is necessitated by Respondents' position that, while they do not oppose the filing of a brief *amicus curiae* by the United States Chamber of Commerce, they decline to

consent to such. Carbon Fuel Company has verbally consented, but to date written consent has not been received.

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, (the Chamber) is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business and professional organizations, both large and small, in the United States. The Chamber has a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000.

The Petitioner and the *amicus curiae,* Bituminous Coal Operators' Association, represent solely the coal and power industries. Because both the direct and indirect ramifications of the Fourth Circuit's decision are of national significance to a wide range of industry and business, it is particularly appropriate for this Court to consider the views of a national organization, the Chamber of Commerce, which represents such a diverse group of industry and business, both large and small.

The Fourth Circuit has ruled that, absent a contract provision to the contrary, a union is not liable for a strike in violation of its collective bargaining agreement unless it instigates, supports or encourages that strike, and further, that the union has no duty to make any effort to terminate or prevent that strike. The court's decision directly intrudes upon the collective bargaining relationships of Chamber members, to their detriment. Moreover, it jeopardizes the production capabilities of those members who are, directly or indirectly, dependent upon the continuing availability of coal to meet their energy needs.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of the Petitioner be granted.

Respectfully submitted,

VINCENT J. APRUZZESE
APRUZZESE & MCDERMOTT
Independence Plaza
500 Morris Avenue
Springfield, New Jersey 07081

Counsel for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Of Counsel:

LAWRENCE B. KRAUS
General Counsel
Chamber of Commerce of the
United States of America
1615 H Street, N.W.
Washington, D.C. 20062

STEPHEN A. BOKAT
National Chamber
Litigation Center
1615 H Street, N.W.
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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of

over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U.S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The question presented in the instant case is of vital concern to the Chamber and its members: Is a union liable for damages in a Section 301 suit where it fails to exercise all reasonable efforts to prevent or terminate a

[1] E.g., *Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.,* 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.,* 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.,* 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.,* 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board,* 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.,* 412 U.S. 67 (1973); *New York Telephone Company, et al.* v. *New York State Department of Labor, et al.,* —— U.S. ——, 47 U.S.L.W. 4303 (Mar. 27, 1979).

strike by its members over a dispute which is arbitrable under the collective bargaining agreement, especially where the union promises to maintain the integrity of that agreement and settle all disputes through the grievance and arbitration procedure?

Strikes in violation of contract undermine industrial stability which is the promise of collective bargaining. The failure to abide by the orderly procedures for resolution of disputes under negotiated grievance and arbitration procedures is not countenanced by our national labor policy. However, such violations in the coal mining industry have become epidemic. *Bituminous Coal Operators' Association, Inc.* v. *United Mine Workers of America,* 585 F.2d 586, 590 (3rd Cir. 1978). This condition threatens not only the vitality of this basic industry, but, on a broader scale, the primacy of arbitration and ultimately the fabric of collective bargaining. Predictability and industrial peace are the only significant employer benefits which the typical collective bargain yields. But these benefits become illusory when the promisor is not accountable. Impunity begets irresponsibility. Accountability must be strictly enforced. In support of that belief, and on behalf of its members, all of whom are clearly stakeholders in this controversy, the Chamber submits this brief *amicus curiae.*

Summary of Argument

The Fourth Circuit has ruled that the UMWA and its District 17 are not in any way liable for damages caused by 31 strikes called by its locals, in violation of the UMWA national agreement, to settle disputes arbitrable under that

agreement. At issue is whether the UMWA and District 17 are liable for their failure to take all reasonable efforts to prevent or terminate those strikes, especially where the UMWA has promised to maintain the integrity of its agreement and settle all disputes through the grievance and arbitration procedure.

The 1947 amendments to the National Labor Relations Act crystallized three areas of congressional thought pertinent here: (1) that the collective bargaining process and the national purpose it serves would be revitalized by making labor organizations legally responsible for their conduct, particularly for breaches of their bargaining agreements; (2) that final and binding arbitration of contract disputes was preferred, as a matter of national policy, to concerted, economic activity; and (3) that once the parties came to terms, there was a positive duty on each of them to exert every reasonable effort to maintain the terms of their agreement. Relying on the stated preference for arbitration as a principal means for facilitating the free flow of commerce, the Court has, in a series of decisions, found that a promise to arbitrate creates for employers and unions rights and obligations which, though not expressed in the contract, are necessary to preserve the central place of arbitration. Such interpretations will be invoked unless the parties have bargained explicit provisions to the contrary. The Fourth Circuit ignored this interpretation of congressional will, holding in effect that the benefits of arbitration, while supporting a duty not to strike, would not support an affirmative obligation to take all reasonable steps to neutralize a strike. Given a history of employee behavior in the coal industry with its enormous losses in production as well as employee bene-

fits, this narrow view of legal responsibility only further undermines congressional objectives of peace through accountability and arbitration. Furthermore, it is directly at odds with congressional requirement that unions, employers and employees exert every reasonable effort to maintain agreed upon working conditions, and it ignores the fact that labor organizations may properly invoke sanctions to further their ligitimate interests.

By its terms, the UMWA's national agreement relies upon grievance and arbitration procedures as the exclusive means of resolving local disputes. The union promises "to maintain the integrity" of its agreement and to make "earnest efforts" to settle disputes through contractual means. These commitments, which are of the essence of the agreement, coupled with the Act's "every reasonable effort" requirement and the policy which protects arbitration as a national asset, operate to impose on the UMWA an "all reasonable efforts" duty.

POINT I

A requirement that a contracting union take all reasonable steps to prevent or terminate strikes over arbitrable grievances is necessary to the goal of industrial peace and is supported by the policy favoring arbitration.

The labor agreement is *sui generis*. Its construction begins but seldom ends with an isolated examination of its terms. "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, [citation omitted], and by the require-

ments of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964).

Any analysis of the question at hand quickly implicates core concepts of federal labor policy. Early on, this Court assessed that the Wagner-Connery Act of 1935 ordained more than a system of meet and confer. "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236 (1938). The full measure of that assessment would not legally be recognized until the enactment of the Labor-Management Relations Act in 1947. Principal among congressional concerns prompting the 1947 amendments was the greatly increased strength of organized labor gained under the protections of the Wagner Act—a shift causing reexamination of the extent to which unions should be treated as having equivalent responsibilities within the bargaining process and under the resulting collective agreement. *Cox, Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 277 (1947). Congress proceeded on two fronts. In adopting Section 301(a),[2] it acknowledged the need to deter work stoppages during the term of the agreement.

[2] 29 U.S.C. 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

> "It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements.
>
> . . .
>
> "It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract. . . . any union with the status of 'representative' under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." S. Rep. No. 105, 80th Cong., 1st Sess. 16, 17-18 (1947), reprinted in I, Leg. Hist. of the Labor-Management Relations Act, 1947, at 422, 423-424 (1948).

To give the concept of responsibility full play, Congress added Section 301(e),[3] thereby restoring common law principles of agency and removing the shield labor had theretofore enjoyed under the Norris-LaGuardia Act. *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395 (1947); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).

[3] 29 U.S.C. 185(e): "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In a parallel move, Congress assured that the bargaining process, no less than the resulting contract, would henceforth be characterized by mutuality of obligation. Particularly offensive in congressional eyes had been the NLRB's treatment of employer attempts at the bargaining table to impose on unions contractual commitments to the integrity of the collective agreement.

> "Notwithstanding the difficulties of instituting suits against unions under present law and of collecting judgments resulting from their breaking their contracts, if an employer asks the union to take steps making it legally responsible for its contract violations, the Board is apt to say the employer is 'unfair' and punish him for 'refusal to bargain' [citations to Board decisions omitted]. The Board has held that an employer is not 'bargaining in good faith' when he asks the union to agree to a 'no-strike clause' and it has disregarded such clauses when unions have agreed to them [citations to Board decisions omitted]." H. R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947), reprinted in I, Leg. Hist. of the Labor-Management Relations Act, 1947, at 310-311 (1948).

From these and similar considerations evolved Section 8(d), defining the duty to bargain as a mutual obligation, and Section 8(b)(3), making it an unfair labor practice for a union representative to refuse to bargain collectively. The Board got the message rather quickly. In a 1948 decision, the Board, in effect, elevated discussion of a no-strike proposal to the status of a mandatory subject of bargaining, contrary to its trial examiner who had held, consistent with earlier precedent, that, "obviously", employers could not extract such commitments from unions

as the price of an agreement, for to do so would "defeat the very purpose for which the Act was enacted." *Shell Oil Company, Inc.*, 77 NLRB 1306, 1351.

Complementing Section 301's command of contract enforceability against unions was congressional endorsement of final and binding arbitration as the preferred method of resolving contract disputes.[4] This provision, for which virtually no comment is recorded in the legislative history, would lay dormant for thirteen years until it bloomed as the centerpiece in the *Steelworkers* trilogy.[5] The essence of the trilogy was that the promise to arbitrate, in return for the promise not to strike, "is at the very heart of the system of industrial self government" and has as its objective "the common goal of uninterrupted production" (*Warrior & Gulf Navigation Co.*, 363 U.S. 581, 582); the process therefore deserves the broadest utilization consistent with what has been promised.

The congressional policy fostering arbitration, with its attendant benefit of industrial peace, has through judicial construction in Section 301 suits been deemed of sufficient force to:

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[4] Section 203(d), 29 U.S.C. 173(d): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[5] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

(1) compel an employer to arbitrate even the most doubtful claims, absent "positive assurance" of non-arbitrability, *Warrior & Gulf Navigation Co.*, supra;

(2) compel an employer to arbitrate claims arising under the agreement, but after its expiration, absent an express exclusion of such claims from arbitration, *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionary Workers Union*, 430 U.S. 243 (1977);

(3) compel a successor employer to arbitrate (with a minority union no less) under his predecessor's agreement the claims of his predecessor's employees now employed by the successor, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964);

(4) imply a no-strike obligation from an employer's undertaking to submit contract grievances to arbitration, absent an express negation of such obligation, *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) (a damage action), *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974) (a suit for injunctive relief).

Carrying the favored policy still further, the Court has determined that union abuse of the arbitration process (violation of its duty of fair representation), despite employer good faith, shall not be permitted to deny rightful expectations of employees under the contract. If abuse is shown, Section 301 will provide a remedy. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). And this is so notwithstanding the rendition of a "final and binding" award.

> "The contractual system would [in the event of union abuse] cease to qualify as an adequate mechanism to secure individual redress for damaging

> failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The ultimate demonstration of the strength of this congressional policy is found in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), later assessed in these words:

> "Indeed, the strong federal policy favoring arbitration of labor disputes was the linchpin of this Court's reasoning in *Boys Markets*. Denial of all equitable relief for breaches of no-strike obligations would have carried 'devastating implications for the enforceability of arbitration agreements' [citing *Boys Markets*]." *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, 381-382 (1974).

The Court in *Gateway* saw no meaningful distinction in the form of relief to be made available, be it damages or injunction. "The policy considerations . . . are equally compelling." Id. n. 14.

As a result of this emerging viewpoint, the weight of the policy has been sufficient to impress upon a labor contract a duty which, even though not articulated, bears a necessary relation to the contract's consideration, furthers the national purpose for which the contract exists, and is not contrary to its express provisions. This most significant development in our labor law over the last several

decades was brushed aside by the court below in favor of an outmoded analysis. Finding that neither the International nor district unions had agreed to indemnify the employer, or use their "best efforts" to prevent a work stoppage, and further finding that neither union had authorized, ratified or encouraged any work stoppage, the court concluded that liability did not extend beyond the local unions. Authority for that conclusion was bottomed on *United Construction Workers and United Mine Workers of America* v. *Haislip Baking Company,* 223 F.2d 872 (1955), a Fourth Circuit decision which, though it issued more than twenty-three years earlier, was regarded as controlling.

Haislip turned on the fact that the International Union neither authorized nor sanctioned the illegal strike and that the contract did not make it liable for such activity; thus, the court reasoned, there was no conduct or contractual undertaking upon which to premise liability. However, this looks at only half the picture. We are not concerned here with affirmative action causing work stoppages, but rather with affirmative action to prevent work stoppages. Considering that *Haislip* was decided in a different judicial climate[6] which later would be swept away by this Court's expansive interpretations of Section 301 rights and remedies, one must question the wisdom of placing *Carbon Fuel* "squarely within the four corners of

[6] For example, at that time Circuit opinion held that an executory agreement to arbitrate, in a labor contract, was not specifically enforceable because of the common law prohibition against such relief, rooted in commercial contract law. *Lincoln Mills of Alabama* v. *Textile Workers Union,* 230 F.2d 81 (5th Cir. 1956), rev'd., 353 U.S. 448 (1957).

Haislip", thereby eclipsing the significance of every major Section 301 decision referenced above.

Congressional concern is clear that grievance arbitration is the preferred route to stability and that a contracting union is accountable when it foresakes arbitration for more primitive rites. That principle is surely frustrated by a doctrine which allocates liability only to irresponsible active participants, but shields an acquiescent party to the contract. The Fourth Circuit, and others, have had no difficulty in holding a local union liable on the "mass action" theory. That proposition rests on two premises. First, a common sense, behavioral presumption that large numbers do not act in concert without leadership. Second, and most significant, "a functioning union *must be* held responsible for the mass action of its members" (emphasis added).[7] The very thought prompting Congress to enact Section 301. Under the decision of the court below, this proposition does not reach beyond the local level despite the fact that the UMWA is party to the contract. Yet realistically, local union liability is a fiction, a dead letter from the moment of judgment. Local union officers and committee functionaries are rank and file miners. Individual members of the local are insulated from a money judgment. 29 U.S.C. 185(b). Local assets are negligible to non-existent because the local has relatively few members and because, under the International's Constitution (Article 13,

[7] *Eazor Express, Inc.* v. *International Brotherhood of Teamsters,* 520 F.2d 951, 963; cited with approval in *Carbon Fuel,* 582 F.2d 1349.

Section 2), *two thirds of every dues dollar is siphoned to the upper tiers of the organization.*[8]

The record confirms the fact of immunity and the results that flow from nonaccountability. In a five year period, man days lost to so-called "wildcat" strikes under the National Bituminous Coal Wage Agreements rose from 500,000 in 1972 to in excess of 2,200,000 in 1977. In 1976, coal operators within District 17 alone experienced over 400,000 man days lost. Losses in welfare and pension fund contributions rose from $5 million in 1972 to $45.1 million for the first eight months of 1977.[9] How much of this strike activity would be actionable under present law is not known.[10] Precision in numbers is not,

[8] At the time of the strikes in *Carbon Fuel,* membership in a local union within defendant District 17's jurisdiction averaged 125 members. Averages for local unions in other districts ranged from 85 to 170 members. District 17, consisting of 96 local unions, had a bank balance of only $30,957.00 as of December 31, 1970. *Hodgson* v. *UMWA,* 344 F.Supp. 990, 997 (D.D.C. 1972) aff'd, 475 F.2d 1293 (D.C. Cir. 1973). By contrast, UMWA had a bank balance of $44,731,770 as of that same date, with total assets exceeding $94 million. *U.S. Department of Labor,* Labor Organization Annual Report (LM-2) for calendar 1970, p.2.

[9] Bituminous Coal Operators Association's statement to UMWA at the commencement of negotiations for a successor agreement in October, 1977. 1 Collective Bargaining—Negotiations and Contracts, (BNA) 12:655-656.

[10] A reflection of the conduct, if not a measure of its legality, is the fact that in the same five year period, over 300 cases were filed against the UMWA, its districts or locals, just in the U.S. District Court for Western District of Pennsylvania. *Republic*

(Footnote continued on following page)

however, requisite to a conclusion that the conduct portrays a virtual abandonment of the *quid pro quo.* Nor have expressions of sentiment for internal reform been encouraging. At a special UMWA convention of 1,800 delegates called to formulate goals for what is now the current National Agreement (the product of a 111 day strike), "not a single delegate" would endorse a resolution penalizing local unions for engaging in wildcat strikes.[11] It is time for the policy which holds a functioning local union responsible because it "must be", likewise to hold a parent, contracting union responsible for the same reason.

A contracting union, committed to a no-strike promise, express or implied, is, absent a clear disclaimer, surely obligated to do in good faith all that it reasonably can to vindicate that pledge, given a threatened or existing strike over an arbitrable grievance. The Court said some years ago that "[n]ational labor policy requires that national unions be encouraged to exercise a restraining influence on explosive strike situations; . . ." *UMWA* v. *Gibbs,* 383 U.S. 739. That recognition was followed eight years later by *Gateway's* rule implying a no-strike pledge where necessary to the arbitration promise, and not expressly

(Footnote continued from preceding page)

Steel Corp. v. *UMWA, et al.,* 570 F.2d 467, 480 n. 18 (3rd Cir. 1978). In fiscal 1975, "there were about 300 Boys Market injunction cases in the Southern District of West Virginia alone involving wildcat strikes." *Cedar Coal Co.* v. *UMWA, et al.,* 560 F.2d 1153, 1168 (4th Cir. 1977). Carbon Fuel contested 48 strikes in this action; 17 were declared to be sympathy strikes and thus not actionable even as to the local unions.

[11] *Labor Relations Yearbook,* 241-242 (BNA) 1977.

negated by a provision permitting a strike. The "reasonable efforts" duty spoken of here is the corollary required if the implied obligation of *Gateway* and the restraining influence encouraged by *Gibbs* are to have any significant effect. Such duty serves the national purpose; to deny it would have devastating implications for the arbitration function.[12] Recognition of that duty is within the reach of Section 301 in the exercise of judicial ingenuity to fashion from the nation's labor laws a responsive jurisprudence. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 456-457. Indeed, that ingenuity need not be innovative because Congress itself has specifically created a broad, reasonable efforts obligation:

> "CO-EQUAL OBLIGATIONS OF EMPLOYEES, THEIR REPRESENTATIVES, AND MANAGEMENT TO MINIMIZE LABOR DISPUTES
>
> (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—
>
> (1) exert *every reasonable effort* to make and *maintain* agreements concerning rates of pay, hours, and working conditions, . . ." 61 Stat. 154, 29 U.S.C. 174 (emphasis added).

[12] A breach of a no-strike pledge in pursuit of an arbitrable grievance does not relieve an employer of its duty to arbitrate that dispute unless the contract expressly so provides. *Packing House Workers Local 721* v. *Needham Packing Co.*, 376 U.S. 247 (1964). A requisite to *Boys Markets* relief is employer willingness to arbitrate the underlying dispute. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 254.

The express or implied contract obligation to refrain from strikes is one of the more obvious "working conditions" which the parties and the employees are bound to maintain. It was a companion provision in 29 U.S.C. 173(d), (the congressional declaration favoring arbitration) that the Court elevated from obscurity to provide the underpinning for the *Steelworkers* trilogy. The interpretation argued for herein is literally coincident with congressional mandate, whereas the decisions reached in *Warrior, Wiley, Nolde, Lucas Flour, Gateway Coal, Vaca, Hines, Needham,* and *Boys Markets,* supra, are simply extensions of congressional preference for the arbitration process. They secured the primacy of arbitration and achieved its beneficial effects.

The judicial response sought in the instant case would further buttress that process. Moreover, it would conform to the fabric of our labor law, particularly when one considers that national policy permits severe consequences to flow when one strikes in violation of contract or in violation of notice requirements, i.e., he loses his protected status. *NLRB* v *Rockaway News Supply Co.*, 345 U.S. 71 (1953); 29 U.S.C. 158(d). To the extent that "reasonable efforts" embrace union discipline, there is an established body of law upon which to build. Congress has recognized the right of a union to "enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522, 29 U.S.C. 411(a)(2). The Court has recognized the right of a union to discipline its members, by fine, suspension from membership or expulsion, in order

to maintain the integrity of its ultimate weapon, the strike. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). A union may likewise discipline its members in order to enforce production ceilings, negotiated for the benefit of bargaining unit members generally. *Scofield* v. *NLRB (Wisconsin Motor Corporation)*, 394 U.S. 423 (1969). So long as the rule to be enforced serves a legitimate union interest, neither the NLRB nor the federal courts will review the reasonableness of fines imposed to coerce compliance. *NLRB* v. *Boeing Company*, 412 U.S. 67 (1973). Thus, if a union is permitted the right and discretion to further its self-interest, equity should not blanch at the logic of requiring reasonable efforts to assure the integrity of one's contractual promise. The strikebreaker, unfaithful to the union's mission, is perversely akin to the striker who is unfaithful to the union's promise.

A reasonable efforts requirement does not aggravate the several concerns which have been expressed when the topic of vicarious union liability has been considered. It has been observed that "unions could be destroyed if they could be held liable for damage done by acts beyond their practical control" *UMWA* v. *Gibbs*, 383 U.S. 736-737 (a Section 303 damage suit for violence by local union members). That is a different issue. *Eazor Express*, supra, presenting the current refinements of the reasonable efforts duty, found that the local and international unions were not responsible for precipitating the strike in violation of the contract. Instead, liability was pegged to the fact that within forty-eight hours of the strike's inception, the unions knew that their modest efforts to restore peace (oral and written exhortations to return to

work) were inadequate, that stronger measures were necessary, but were not undertaken. Accordingly, damages were measured from the time beginning forty-eight hours after the strike commenced. If that formula leads to destruction of unions, it is a case of self-destruction for refusal to perform acts within "their practical control". A separate concern, also noted in *Gibbs* is that unions should be encouraged to exercise a restraining influence and such efforts should not expose them to liability, on a ratification theory, for misconduct which has already occurred. 383 U.S. 739. Efforts to police one's agreement are the antithesis of ratification of contract misconduct, whereas the failure to do so could, depending upon circumstances, evidence condonation and be a separate basis for liability.

A final concern which has been expressed is that stern measures by a union against irresponsible members would be counterproductive, would simply create greater controversy and tend to extend rather than terminate the work stoppage. While such a result is conceivable, does that possibility justify doing nothing? Employers have been similarly confronted in attempts to comply with requirements under the Occupational Safety and Health Act. 84 Stat. 1590, 29 U.S.C. 651, *et seq.* In *Atlantic & Gulf Stevedores, Inc., et al.* v. *OSAHRC*, 534 F.2d 541 (3rd Cir. 1976) the employers were accused of failing to require that their longshoremen employees wear hard hats in conformity with an OSHA safety standard. The employees had largely ignored the employer's educational and non-coercive efforts to induce compliance. The employers had avoided attempts to enforce through discipline-discharge because they feared such would trigger a walkout, a re-

sult the court found "likely" to occur. Nonetheless, the court affirmed OSHA's view that such speculation would not justify the failure to take "all available legal steps to secure compliance", including discipline, discharge and bargaining with the union for the unilateral right to take these measures. Some individual employers, placed in such a no-win position, might regard that analysis as harsh, but they must succumb to the dominance of that Act. By contrast, a contracting union, confronted with an unlawful strike not of its making, is in a can't-lose position. If it takes "all available legal steps" in good faith, and the strike continues nonetheless, there would be no basis for international union liability unless the contract so provided. And the economic harm falls on the employer and the employees, not the union. In any event, it must be clear that the chances of successfully terminating the strike—which is what this exercise is all about—are considerably greater where coercion on the employee originates with the union and is tempered by the fraternal aspects of unionism than where it originates with the employer who is already the object of the strike.[13]

A different kind of concern, not frequently expressed but real nonetheless, is the risk to judicial authority. When requests for injunctive relief become, of necessity, part of the routine in an industry, each successive grant of relief brings the process closer to the day when the order is regarded with the same disdain as the contract provision

[13] Further, the employer is sometimes the last to know the true nature of the dispute, and seldom knows who first verbalized the thought of a walkout. Employer discipline under these conditions promotes a shot-gun approach which in itself detracts from the chances of success.

being enforced. *Cedar Coal Co.*, supra, presents an example. A strike precipitated by a dispute over a job bidding situation later escalated into a strike against federal injunctions and in support of a union demand that the federal judges in the Southern District of West Virginia "be investigated" because of their alleged habit of siding with the mine operators. 560 F.2d 1158-1160. Federal courts can undoubtedly take care of themselves, but by placing a duty on the contracting union to get its own house in order, the need to rely on the judiciary diminishes as does the risk of eroding its authority.

To summarize, there now exists a gap in the collective bargaining scheme which experience has shown is creating both a substantial impediment to commerce in a vital industry and a significant obstacle to the effectiveness of the bargaining process. Congress intended, in the 1947 amendments, to create and assure union responsibility. At the same time, it endorsed arbitration over economic warfare as the means for resolving contract disputes. That endorsement has become a major factor in labor policy, but its favored place has been ignored by the UMWA and its members in the coal industry. That evasion has been fueled by an asserted absence of legal responsibility. The tools are present to remedy the situation; the need is clear.

POINT II

The UMWA contracts should be impressed with a "reasonable efforts" obligation.

Carbon Fuel's claims rest on the 1968 and 1971 National Bituminous Coal Wage Agreements. The former was examined by the Court in *Gateway Coal.* The terms of the two agreements pertinent to this discussion are essentially the same. The contention here is that "the" agreement may and should be interpreted to impose on the International Union liability for its failure to expend every reasonable effort to prevent or terminate 31 strikes, unlawful under the agreement, engaged in by its locals during the period February, 1969—October, 1973. The court below concluded that "In light of the bargaining history, . . . such an interpretation, in effect rewrites the terms of the contract upon which the parties had agreed." 582 F.2d 1350.

Beginning with the bargaining history, it is relevant to note how the International Union came to bargain a single, national agreement. In its infancy, the 1890's, and for some time thereafter, the Union delegated to its districts the responsibility of negotiating separate agreements with the various employers. Over time the coal operators "pitted District against District to the general detriment of all coal miners and in this manner precluded any wage stability in the industry." *Hodgson,* supra, 344 F.Supp. 996. To eliminate this and other disadvantages, the International, in the 1930's, moved to consolidate power. Following amendments to its constitution, giving it supreme authority over districts and other subordinate bodies,[14] it

[14] As of 1972, 17 of its 23 districts in this country had "provisional" status, a condition tantamount to trusteeship. Defendant District 17 was relegated to provisional status for 48 years, until liberated in 1972 by the decision in *Hodgson,* supra, 344 F.Supp. 994, 995.

assumed the task of negotiating a single, nation-wide collective agreement.

The contract is between the signatory employer and the International "on behalf of each member". Article I.[15] Contract ratification is by the membership, not by delegates. Article 19, Sec. 4, UMWA Constitution. Negotiations for a national agreement are supervised by the "UMWA Bargaining Council", a group consisting of each District president and an International executive board member for each district. Article 19, Secs. 1 through 5, UMWA Constitution.[16] The International's supervision of the contract is pervasive, reaching such minutiae as the layout of a standard grievance form. Article XVII(b)(2) and addendum. Local union existence is scarcely recognized, being referenced less than a half-dozen times in a document exceeding 100 pages.

The contract exudes an enthusiasm for arbitration. In addition to an extremely broad grievance and arbitration procedure covering "any local trouble of any kind" at the mine, including any difference "about matters not specifically mentioned in this Agreement", Article XVII(b), there are procedures tailored for grievances concerning scope of the contract, Article II; safety and health, Article III(h); conditions of imminent danger, Article III(g);

[15] Contract references are to the 1971 National Bituminous Coal Wage Agreement.

[16] "Provisional" status, so widespread among districts as of 1972, meant that the district president was appointed by the International Union as was the district committee which nominated executive board members. *Hodgson,* supra, 344 F.Supp. 995.

discharge, Article XVIII; and employer removal of a Health and Safety Committee, Article III(g). The local union has no role in the processing of grievances; responsibility at the mine level resides in a mine committee consisting of three miners elected by fellow employees. Thereafter, the dispute is handled by a district representative. Article XVII(b). The local union bears none of the costs of arbitration. Article XVII(b)(5). The contract twice asserts the requirement that "an earnest effort shall be made" to settle differences through the specified procedures. Article III(h) and XVII(b). Most significant to this discussion, the parties

> ". . . agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, . . ." Article XX.

There is no provision exonerating the International or subordinate bodies or limiting their liability in the event of a strike during contract term.[17]

The court below referenced the covenant "to maintain the integrity of the agreement", but promptly dismissed it

[17] By contrast, the Bureau of National Affairs' all-industries survey shows that 35% of the agreements sampled contain provisions limiting the contracting union's liability for violation of a no-strike pledge. "Some form of positive action usually is required of the union to avoid liability". 2 Collective Bargaining—Negotiations and Contracts, (BNA) 77:4.

as insignificant to the liability question. It retreated to the rule of *Haislip,* which involved only a single strike and which hinged liabilty to those responsible for instigating, supporting or ratifying the strike. But the "integrity" covenant goes beyond conduct prohibited by *Gateway* and bespeaks a separate duty which is not satisfied simply by refraining from prohibited conduct. It begins with the specific promise by the International to make "earnest efforts to settle differences" promptly. It looks to the role of the International Union as contracting party, the historical reasons for that role, the benefits gained by the union from it and the resulting pre-emption of local union authority and responsibility. It recognizes the manifest reliance upon multiple, peaceful procedures for settlement of all manner of local disputes. Quite simply, it is virtually the only consideration flowing from the union to the employer supporting a myriad of employer promises, including the surrender of decision making to a third party. Did the employers bargain for naught? By reserving International liability to active participation in the strike itself, and refusing to recognize any other basis for liability, the court has effectively withdrawn the integrity covenant, notwithstanding its asserted unwillingness to rewrite the parties' contract. The court gave greater weight to its view of bargaining history than to the bargain itself. In an industry especially troubled by unlawful strikes, it cannot be doubted that the employers—and the union—contemplated that the integrity covenant was of the essence of the agreement, there being no other expression of employer protection. The "essence" factor, and the plain congressional requirement that the union, the employees and the employer "shall exert every reasonable effort to . . . maintain"

promised working conditions, combine to impose on the International a positive duty to do just that. What the statute and the contract say should control, rather than be negated by the vagaries of a bargaining history which has already been deemed largely irrelevant to Section 301 concerns.[18]

Equally unpersuasive is the Fourth Circuit's observation that the contract contained no indemnity obligation making the International liable for unlawful strikes.[19] There is, in fact, no exculpatory clause either. It is a clean slate, precisely the situation existing in *Wiley, Lucas Flour, Nolde, Needham* and *Gateway,* supra. In each of those cases, it was made clear that the preferred policy of arbitration, would prevail in the absence of an express contract provision clearly articulating an exception to that policy.

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[18] The unions argued in *Gateway* that a no-strike pledge could not be implied because the 1968 National Agreement, then under examination, had expressly rescinded the no-strike provisions contained in two earlier agreements. In a footnote disposition, the Court said that such rescission "does not, however, purport to negate any no-strike duty created by the present agreement", which duty, the Court said, arises from the presence of arbitration as the exclusive means for dispute resolution. 414 U.S. 384 n. 15. The same reasoning should dispose of the Fourth Circuit's analysis which found significant the rescission of earlier no-strike provisions, as well as the deletion, beginning in the 1950's, of a "best efforts" provision found in several prior agreements. Not only is there no language in the instant agreements rescinding the "best efforts" obligation, there is affirmative language requiring earnest efforts and maintenance of the integrity of the contract.

[19] The NLRB has held that an employer proposal to obtain an indemnity clause is not a mandatory subject of bargaining. *Hall Tank Company,* 214 NLRB 995 (1974) and cases cited therein.

Throughout the course of 31 unlawful strikes, Carbon Fuel has been deprived of the benefit of its bargain. Yet for every employer decision which precipitated one of these strikes, the company was duty bound to let a third party review, and perhaps reverse, its actions. Such third party review is essential to the International's need for uniformity in the application of the agreement. A national contract, left to be enforced only through strike action, would soon lose all semblance of uniformity. The International would be returned to the early days when strength of the individual employer and zeal of local union members were determinative. That was found unsatisfactory, and thus was forsaken by the International in favor of uniformity. Arbitration was extracted from the employer as the means of preserving that uniformity. In turn, the law imputed the duty not to strike. At stake now is not only the integrity of the parties' agreement, but the integrity of the policy favoring arbitration. The International has pledged its integrity. Judicial action should require that that pledge be enforced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

APRUZZESE & MCDERMOTT
A Professional Corporation
Attorneys for the Chamber of Commerce of the United States
By: VINCENT J. APRUZZESE
A Member of the Firm

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